tions still runs against the action; an heir can get no benefit, as the chose in action cannot be regarded as impliedly assigned to him; and the original grantee may release a covenantor who is without notice of the assignment, thus making a grantee's rights uncertain.

More satisfactory principles have been developed by most American courts which have decided the point. They have held that although there may technically be an immediate breach, no real breach exists until actual damages are suffered, so that, until such time, the statute does not run, and the covenant passes with the land, like the covenant for quiet enjoyment. *Richard* v. *Bent*, 59 Ill. 38; *Foote* v. *Corry*, 10 Ohio, 317; *Post* v. *Campan*, 42 Mich. 90. This view, which in effect regards the covenant as one purely for future indemnity, when made logically consistent by recognizing no immediate technical breach, seems clearly the best. All the desired results are thus obtained, and although the literal wording of the covenant is violated, yet in view of the facts that only indemnifying damages are allowed, that the covenant purports to be made with the covenantee, his heirs and assigns, and that its original purpose was solely to indemnify, the interpretation is readily defensible. This same doctrine ought properly to be applied to the covenants of right to convey and of seisin. Since however, in actions on these covenants, substantial damages may be recovered before they are actually sustained, the effect of an immediate breach has been less burdensome, and in consequence the decisions give less authority for holding such cases within the scope of the more liberal view.

RECENT CASES.

AGENCY — COMMERCIAL TRAVELLER — AUTHORITY TO CONTRACT. — *Held*, that in the absence of express authority to bind the principal, a commercial traveler can merely solicit and transmit orders, and the contract is not complete until the order is accepted by the principal. *John Matthews, etc., Co.* v. *Renz*, 61 S. W. Rep. 9 (Ky.).

The order solicited by the drummer has frequently been declared, as here, to be a mere offer, requiring acceptance by the principal to complete the contract. *Burbank* v. *McDuffee*, 65 Me. 135; *McKindly* v. *Dunham*, 55 Wis. 515, 518. The proper rule of law in such cases, however, is the ordinary rule of agency, that unless the act is authorized the agent cannot make a contract binding his principal; but such authorization may be either express or implied, and its extent is in each case a question for the jury. *Finch* v. *Mansfield*, 97 Mass. 89. It is doubtless generally the fact that there is no authority to bind the principal, but deciding such matters as questions of law leads to objectionable results. For example, a local custom giving agents greater authority than usual was held invalid on the ground that it was inconsistent with what had been declared to be a rule of law. *Higgins* v. *Moore*, 34 N. Y. 417. While the result reached in the principal case is doubtless satisfactory as a matter of fact, the proposition stated as a rule of law, though supported by authority, must be regarded as unsound.

BANKRUPTCY — MINING CORPORATIONS — INVOLUNTARY BANKRUPTCY. — The Bankruptcy Act of 1898, § 4 *b*, provides that "any corporation engaged principally in manufacturing, trading . . . or mercantile pursuits . . . may be adjudged an involuntary bankrupt." *Held*, that under the above section, a corporation engaged in coal-mining is not liable to involuntary bankruptcy. *In re Woodside Coal Co.*, 3 N. B. N. Rep. 336 (Dist. Ct., E. D. Pa.).

A coal-mining corporation, as lessee of mining lands, paid the owner of the lands a certain sum per ton for coal mined, and also sold supplies to its workmen. *Held*,

that under § 4 *b* of the Bankruptcy Act, the corporation is liable to involuntary bankruptcy. *In re Keystone Coal Co.*, 3 N. B. N. Rep. 349 (Dist. Ct., W. D. Pa.).

In the absence of judicial construction, § 4 *b* of the Bankruptcy Act would hardly include mining corporations, even when, as often happens, such corporations, in connection with mining, engage in operations allied to trade or to manufacture. LOWELL, BANKR., 356. The word "traders" in bankruptcy statutes has usually been held not to include mine-operators. *Ex parte Schomberg*, L. R. 10 Ch. 172. The same result has been reached although the operator furnished supplies to his workmen. *Ex parte Gallimore*, 2 Rose, 424. "Mercantile" seems not to extend the meaning of "trading" in this direction. "Manufacturing corporations," although apparently a new definition in bankruptcy law, has been held, under state taxation statutes, not to include mining corporations. *Byers* v. *Franklin Coal Co.*, 106 Mass. 131. The decision in *In re Woodside Coal Co.*, *supra*, is therefore apparently correct under the Act, however undesirable its result, and is in accord with earlier decisions under the present law. *In re Chicago-Joplin, etc., Co.*, 104 Fed. Rep. 67. See 14 HARV. LAW REV. 298. As it is probably advisable to place in one class all corporations engaged principally in mining, the distinction suggested in *In re Keystone Coal Co.*, *supra*, between corporations working leased lands and others, would seem undesirable, besides finding no support in the Act.

BANKRUPTCY — STATE EXEMPTION LAWS — WAIVER OF EXEMPTIONS. — Under the exemption laws of Georgia a debtor had waived certain rights to exemption in favor of particular creditors. The debtor becoming bankrupt, the trustees set apart to him certain property as exempt, whereupon these creditors petitioned that the bankrupt's discharge be withheld until they could enforce their rights under the waivers, either in the state courts or in the court of bankruptcy. *Held*, that the petition cannot be granted. *Woodruff* v. *Cheeves*, 105 Fed. Rep. 601 (C. C. A., Fifth Circ.).

By the Bankruptcy Act of 1898, §§ 6 *a*, 70 *a*, state exemption laws are still in force, and the title to exempt property remains in the bankrupt. As waivers of exemptions usually create no lien, their holders may prove their claims in bankruptcy and will be barred by the discharge. BANKR. ACT of 1898, § 17 *a*. If, then, property in which exemption rights have been waived is held, as in the principal case, to be exempt under the Act, the bankrupt receives it free and clear, and waiver of exemptions, provided for by state laws, is virtually abolished. *In re Black*, 4 Am. Bank. Rep. 776; *In re Woodruff*, 96 Fed. Rep. 317. To avoid this difficulty by withholding the discharge, after delivering the property to the bankrupt as exempt, until creditors holding waivers reach the property through the state courts, appears contrary to the express words of the statute. BANKR. ACT OF 1898, § 14 *b*. The proper solution seems to be to allow the trustee to take such property as not exempt. *In re Sisler*, 96 Fed. Rep. 402. Apparently the bankruptcy courts have power to administer it for creditors holding waivers. *In re Garden*, 93 Fed. Rep. 423; *In re Sisler*, *supra*. The principal case is supported, however, by several earlier decisions under the Act. *In re Camp*, 91 Fed. Rep. 745; *In re Hill*, 96 Fed. Rep. 185. Nevertheless it seems incorrect and ought not to be followed.

BILLS AND NOTES — CHECK PROCURED BY FRAUD — LIABILITY OF DRAWEE. — The Negotiable Instruments Act provides that no right can be acquired under a signature made without the authority of the person whose signature it purports to be, "unless the party against whom it is sought to enforce such right is precluded from setting up the . . . want of authority." R. I. PUB. LAWS OF 1899, c. 674, § 31. A, representing himself as B, called upon C and induced the latter to draw for him a check payable to the order of B. A indorsed in the name of B and the bank paid the indorsee. *Held*, that the bank is liable to C for the sum paid, both at common law and under the Negotiable Instruments Act. *Tolman* v. *American Nat. Bank*, 48 Atl. Rep. 480 (R. I.).

If A, representing himself as B's agent, procures an instrument payable to B, obviously the drawer intends neither to make A payee nor to authorize him to indorse. *Rogers* v. *Ware*, 2 Neb. 29. But if A, representing himself as B, obtains an instrument payable to B, the drawer fairly intends that the person before him shall be the payee, although he erroneously supposes that this person is B. See 14 HARV. LAW REV. 60. In the present case therefore, apart from statute, the bank, having followed the directions of the drawer, should not be liable to him. *Land, etc., Co.* v. *Northwestern Nat. Bank*, 196 Pa. St. 230. The point does not seem to have arisen before under the Negotiable Instruments Act, and no decision at common law has been found

in accord with the principal case. Moreover under the English Bills of Exchange Act, apparently the bank would be protected. See *Clutton* v. *Attenborough*, [1897] App. Cas. 90. Finally, the Negotiable Instruments Act hardly compels the result reached, for although the bank relies upon an indorsement made without the authority of the person whose signature it purports to be, yet, as that indorsement accorded with the intentions of the drawer, he ought to be precluded from setting up the want of authority.

BILLS AND NOTES — PURCHASER FOR VALUE — AMOUNT OF RECOVERY. — A note having been procured by fraud, a purchaser for value without notice before maturity sued the maker on the note. *Held*, that only the amount paid by the plaintiff for the note, with interest, can be recovered. *People's Nat. Bank* v. *Mulkey*, 61 S. W. Rep. 528 (Tex., Civ. App.).

There is some authority supporting the proposition of this case. *Huff* v. *Wagner*, 63 Barb. 215. The sounder view, which seems at least equally well supported by authority, is that the holder should recover the face value of the note, and that the amount paid for it is material only as evidence on the question of *bona fides*. *Lay* v. *Wissman*, 36 Iowa 305. The suit is brought on the express promise contained in the note, to which the plaintiff has legal title, and therefore the amount recovered should be the face value, unless the maker has an equitable defence. If he has such a defence the purchaser is not holding free from equities, and the fundamental principle is violated that a purchaser for value without notice takes free and clear from all equities. *Kitchen* v. *Loudenback*, 48 Ohio St. 177. Moreover the rule in the principal case is objectionable on account of the inconvenience and confusion in commercial dealings which would result. *Cromwell* v. *County of Sac*, 96 U. S. 51.

CONTRACTS — CONDITIONS — DEFENCE OF PLAINTIFF'S NON-PERFORMANCE. — The defendants agreed to employ the plaintiff for a certain period, and the plaintiff agreed to perform his work in a manner satisfactory to the defendants. *Held*, that the defendants might discharge the plaintiff before the expiration of the term if the work was not absolutely satisfactory to them. *Gwynne* v. *Hitchner*, 48 Atl. Rep. 571 (N. J., Sup. Ct.).

It is of vital importance to determine in a contract whether either promise is made an express condition. If so, then, according to the general doctrine that an express condition must be exactly performed, any breach of that promise will necessarily be fatal to a recovery against the other party. *Kelly* v. *Sun Fire Office*, 141 Pa. St. 10. If the promise is not an express condition, the question is whether there has been substantial performance. LANG., SUM. CONT., §§ 157–161. If the breach is only a slight one, the other party must perform on his part and seek his remedy in damages. *Norrington* v. *Wright*, 115 U. S. 188; *King Philip Mills* v. *Slater*, 12 R. I. 82. Apparently in the principal case the plaintiff's promise was not an express condition, but the court seems to have overlooked the importance of that question. The case should have turned on the materiality of the breach, and the determination of that question should have been left to the jury.

CONTRACTS — HUSBAND AND WIFE — SEPARATION AGREEMENTS. — In consideration of the plaintiff's promise to live apart from the defendant, her husband, the latter promised to assign certain life insurance policies to her. *Held*, that the contract is void as against public policy. *Baum* v. *Baum*, 85 N. W. Rep. 122 (Wis.). See NOTES, p. 147.

CONTRACTS — REPUDIATION — ANTICIPATORY BREACH. — The defendant contracted to leave by will a certain share of his property to the plaintiff, in consideration of the latter's agreement to work for the defendant without recompense until twenty-one years of age. After the plaintiff had fully performed, the defendant asserted that he would not carry out his promise. *Held*, that the plaintiff has no present right of action, as the defendant may later elect to perform. *Pittman* v. *Pittman*, 61 S. W. Rep. 461 (Ky.).

The doctrine of anticipatory breach has been definitively accepted by the English and by most of the American courts. *Synge* v. *Synge*, [1894] 1 Q. B. 466; *Roehm* v. *Horst*, 178 U. S. 1. The hardship imposed on a plaintiff by the supposed necessity of continuing an otherwise useless performance, in order to put himself in a position to sue on his contract when the time for its performance by the defendant shall arrive, has been held to justify the doctrine. This reasoning assumes that the defendant's repudiation would not prevent his relying on a resulting non-performance

on the plaintiff's part as an answer to the plaintiff's action. It has been suggested that where, as in the principal case, a contract has been fully performed on the plaintiff's part before repudiation, the case does not fall within the reason for the rule. *Roehm* v. *Horst, supra.* But except in cases where the defendant's obligation is merely to pay money, the plaintiff would generally be obliged, in order to protect himself, to make other contracts, which would usually render it inconvenient to accept the defendant's performance. In justice, therefore, the plaintiff ought to have a right, without losing his cause of action against the defendant, to refuse acceptance in case the latter should change his mind and offer to perform. But if the defendant's repudiation does not prevent his setting up a resulting non-performance on the plaintiff's part, it would not prevent his setting up a resulting unwillingness to accept, and so defeating the plaintiff's cause of action. Convenience, which is held to justify the anticipatory breach doctrine in the case of contracts still executory, would equally justify the application of the doctrine in most cases where the plaintiff has fully performed. As these cases, therefore, cannot as a class constitute a proper exception to the general doctrine, and as no other exception has ever been suggested which would include the principal case, the decision must be regarded as altogether inconsistent with the prevailing rule.

CONTRACTS — SPECIFIC PERFORMANCE — BUILDING CONTRACT. — The plaintiffs, in pursuance of a scheme of street improvement, sold and conveyed a plot of land to the defendant, who covenanted to erect buildings thereon in accordance with certain specified plans. *Held*, that specific performance of the defendant's promise will be ordered. *Mayor, etc., of Wolverhampton* v. *Emmons*, [1901] 1 Q. B. 515 (C. A.).

As a general rule, specific performance of a building contract will not be enforced, the courts thinking the remedy at law to be usually adequate, and being impressed by the difficulty of supervising the performance. *The South Wales Ry. Co.* v. *Wythes*, 1 K. & J. 186. In England, however, there is a well established exception, when it appears that the defendant has by the contract obtained from the plaintiff the land on which the work is to be done, that the work is accurately defined, and that the plaintiff has a material interest in its execution, for which damages would not be adequate compensation. FRY, SP. PER., § 103; *Storer* v. *Great Western Ry. Co.*, 2 Y. & C. Ch. 48. In the United States the rule is in general the same. *Gregory* v. *Ingwersen*, 32 N. J. Eq. 199. *Cf. Ross* v. *Union Pacific Ry. Co.*, 1 Woolw. (Circ. Ct.) 26. The principal case seems from the facts reported to fall within the exception as stated, and is therefore sound according to English and American authority.

CONTRACTS — STATUTE OF FRAUDS — AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR. — A turnpike company orally agreed to exempt the occupants of a certain farm, for all time, from liability to pay tolls. *Held*, that this contract did not come within the section of the Statute of Frauds relating to agreements not to be performed within one year. *Great Western Turnpike Co.* v. *Shafer*, 57 N. Y. App. Div. 331.

When a contract does not fix the time for performance, any possibility in the natural course of events of full performance within a year is sufficient to avoid this section of the statute. *Clark* v. *Pendleton*, 20 Conn. 495. This includes cases where the time for performance is expressly or impliedly made dependent on length of life. *Fenton* v. *Emblers*, 3 BURR. 1278. But when the contract by its express terms is to require more than a year for complete performance, the statute clearly applies. *Boydell* v. *Drummond*, 11 East, 142. In several cases of this latter class however, in which on a certain contingency, such as the death of a person concerned, the contractor's liability might in fact cease within a year, courts have held that the statute did not apply. *Doyle* v. *Dixon*, 97 Mass. 208. But under such circumstances it seems rather that further performance is excused on the ground of impossibility than that performance is then completed, and the statute should be held to apply. *Dobson* v. *Collis*, 1 H. & N. 81. In the principal case, where the exemption was expressly for all time, any such contingency as the dissolution of the corporation within a year would not make performance complete, but would simply make future breach impossible. Therefore the decision seems wrong.

CRIMINAL LAW — FORMER JEOPARDY — CONTINUOUS OFFENCE. — The defendant kept a gambling room for a continuous period of time. Two indictments were found against him covering different portions of this period. *Held*, that a conviction on one indictment is a bar to a prosecution on the other. *Cawein* v. *Commonwealth*, 61 S. W. Rep. 275 (Ky.).

The court proceeds upon the theory that there is but one continuous offence up to the date of the finding of the indictments, and that the state, like the plaintiff in a civil case, is not allowed to split up one cause of action. Clearly if the state indicted at the end of each day, the statutory penalty might be imposed for each day's offence. It is difficult to see why by lapse of time offences once distinct should become inseparable, so that only one penalty can be imposed. The result is that one committing the crime for a long space of time before prosecution can be punished no more severely than one who engages in the criminal occupation for a day, though the former has done a much greater wrong to the state. The analogy of civil cases does not apply. There the total recovery of the plaintiff is not diminished by the operation of the rule, whereas here the total amount of punishment imposed depends entirely on the number of actions brought. The authorities on the point are squarely in conflict. See in accord with the principal case, *In re Snow*, 120 U. S. 274; *State* v. *Lindley*, 14 Ind. 430; *contra*, *Commonwealth* v. *Connors*, 116 Mass. 35; *People* v. *Sinell*, 131 N. Y. 571. The rule of the latter cases seems preferable.

CRIMINAL LAW — HOMICIDE — PREVENTION OF FELONY. — The defendant saw his brother and the deceased fighting, and shot the latter. He defended on the ground of imminent peril to his brother, who, it appeared, provoked the fight, although it was not shown that the defendant knew this. *Held*, that since the defence relied on would not have been available to his brother, the defendant cannot take advantage of it. *Wood* v. *State*, 29 So. Rep. 557 (Ala.).

It is well settled that one may interfere, even to the taking of life if necessary, to prevent a violent felony. *Regina* v. *Rose*, 15 Cox C. C. 540. Moreover, if one acts properly under the circumstances as they reasonably appear to him at the time, he is guilty of no crime. *Levett's Case*, Cro. Car. 538; *Commonwealth* v. *Power*, 48 Mass. 596. Consequently, the fact that the deceased would have committed no felony in killing his antagonist, if not then known to the defendant, is immaterial. In each case it is a question of fact what the defendant did reasonably believe, and unless the court is prepared to rule that on the evidence stated no one in the defendant's position could reasonably have believed that what the deceased was apparently about to do would constitute a felony, the decision can hardly be supported.

EQUITY — INJUNCTION AGAINST PROSECUTION OF SUIT — CONTEMPT. — The defendant, in violation of an injunction issued by the New Jersey Court of Chancery against the further prosecution of his action for divorce in North Dakota, obtained a decree in that action against the present plaintiff. *Held*, that the defendant must pay a fine for his contempt, and be imprisoned until he takes proper proceedings to have the divorce set aside. *Kempson* v. *Kempson*, 48 Atl. Rep. 244 (N. J., Ch.). See NOTES, p. 145.

EVIDENCE — ADMISSIBILITY OF CONFESSIONS — COURT AND JURY. — *Held*, that where there is conflicting evidence as to the voluntary character of a confession, the question of its admissibility is for the jury under proper instructions. *State* v. *Moore*, 61 S. W. Rep. 199 (Mo.).

The decision is in accord with the practice in many jurisdictions of leaving to the jury the question of the voluntary character of a confession, with instructions to disregard it if made under improper circumstances. *Burdge* v. *State*, 53 Oh. St. 512. This practice is at variance with the elementary principle that all questions whether of law or of fact relating to the admissibility of evidence are for the court alone. *Bartlett* v. *Smith*, 11 M. & W. 483. The burden of showing the voluntary nature of the confession would seem to be upon the prosecution. *Regina* v. *Thompson*, [1893] 2 Q. B. 12; *contra*, *Rufer* v. *State*, 25 Oh. St. 464 (*semble*). Accordingly, unless the court is satisfied that the confession was made under proper conditions, it should not be allowed to go to the jury. *State* v. *Andrew*, Phillips (N. C.) 205. The duty of the jury to consider the surrounding circumstances in determining the probative value of the confession when admitted, is a matter entirely distinct from the right of the prisoner that only evidence that is legally admissible shall be adduced against him. *Brown* v. *State*, 71 Ind. 470. The decision seems wrong on principle, and prejudicial to the prisoner in its effect, for a confession once admitted, even though found to be involuntary, can hardly fail to exert some influence upon the minds of the jurors.

EVIDENCE — CRIMINAL LAW — ADMISSION BY CONDUCT. — In a trial for murder, evidence was admitted that half an hour after the shooting occurred, and before the

dying man was conscious of impending death, he accused the prisoner of shooting him for nothing, and that the prisoner denied it. *Held*, that since the evidence could not come in as a dying declaration, nor as a part of the *res gesta*, it was not admissible. *Brown* v. *State*, 29 So. Rep. 519 (Miss.).

This ruling is directly in accord with one lately made by a Massachusetts Superior Court in the Eastman trial, and seems correct. When statements are made in the presence of a party to the litigation, and his answer, or failure to answer, supplies a fair inference of the truth of what was said, the statements and the manner of their reception may be shown in evidence. *Commonwealth* v. *Brown*, 121 Mass. 69. But the question whether such statements, by themselves inadmissible as hearsay, form in connection with the defendant's conduct, a basis for inferring an admission, so as to be competent on that ground, is a question for the court. Therefore, when acquiescence cannot fairly be found from the defendant's silence, or from his answer, when one is made, the evidence is properly excluded. *Moore* v. *Smith*, 14 Serg. & R. (Pa.) 388; *Mattocks* v. *Lyman*, 16 Vt. 113. English cases have held that whenever the statements are answered the evidence is admissible. *Rex* v. *Edmunds*, 6 C. & P. 164. But the English judges may charge on the weight of the evidence, and thus they reach almost the same results as would be reached under the doctrine contended for above. *Jones* v. *Morrell*, 1 C. & K. 266. In the principal case an admission of guilt could not possibly be inferred from the reply; and the evidence was therefore properly rejected. Moreover, the fact that the jury would be almost sure to misuse the evidence would incline the court to a strict observance of the rules of exclusion.

EVIDENCE — HEARSAY — POST-TESTAMENTARY DECLARATIONS. — The post-testamentary declarations of a testator were offered as evidence against the validity of an alleged will. *Held*, that such evidence is inadmissible unless part of the *res gesta*. *Throckmorton* v. *Holt*, 21 Sup. Ct. Rep. 474. See NOTES, p. 149.

EVIDENCE — REAL EVIDENCE — PROOF OF AGE. — In an action for personal injuries, there being no evidence of the plaintiff's age except his personal appearance before the jury, the lower court charged that his age should be considered in estimating the damages. *Held*, that the charge was erroneous for want of evidence upon which to base it. *Phelps* v. *Salisbury*, 61 S. W. Rep. 582 (Mo.).

As early as 1219 are found instances of the determination of age by the inspection of the court. BRACTON'S NOTE-BOOK, ii., Case 46. By the almost unanimous concurrence of modern decisions it is established that the age of one alleged to be an infant, or under the criminal age, or below the age of consent, may be determined by the jury on the basis of the person's appearance, though no other evidence is introduced. *Commonwealth* v. *Emmons*, 98 Mass. 6; *State* v. *Arnold*, 13 Ired. (N. C.) 184. So it may be decided whether or not a plaintiff is an old man. *Bertram* v. *People's Ry. Co.*, 154 Mo. 639. Even the competency of an employee or a defendant's sanity may be judged by inspection without more. *Keith* v. *New Haven, etc., R. R. Co.*, 140 Mass. 175; *Queen* v. *Goode*, 7 A. & E. 536. In the principal case the jury was not called upon to form any accurate judgment as to the plaintiff's age, but merely to come to some approximate conclusion as indicating his future prospects. For this purpose his personal appearance furnished sufficient evidence. The case cannot be distinguished from those cited, and the decision is opposed to the great weight of authority.

PLEADING — GENERAL ALLEGATION OF FRAUD — CONCLUSION OF LAW. — *Held*, that a general averment of fraud is sufficient on demurrer. *Fivey* v. *Pennsylvania R. R. Co.*, 48 Atl. Rep. 553 (N. J., Sup. Ct.).

A conclusion that certain facts constitute fraud necessarily involves the application to those facts of a rule of law. It follows that a general allegation of fraud is a statement of a conclusion of law and not an averment of fact. According to the well settled rule of the common law, conclusions of law are immaterial allegations in the pleadings and must upon demurrer be disregarded. Some authority is to be found in support of the principal case. *Christmas* v. *Russell*, 5 Wall. 290, 303. But by the great majority of decisions it is held that when fraud is relied upon the facts must be fully pleaded. *Cohn* v. *Goldman*, 76 N. Y. 284; *Wallingford* v. *Mutual, etc., Soc.*, L. R. 5 App. Cas. 685; STORY, EQ. PL., 10th ed., § 251. Similarly a general allegation of negligence is insufficient. *Griggs* v. *St. Paul*, 9 Minn. 246. The rule of the principal case sacrifices one of the essential objects of pleading, namely, to apprise the court and the opposite party of the facts intended to be relied on. Moreover it becomes

impossible to settle the case upon demurrer, although if the facts were stated it might appear that they were insufficient in law to support the plea. It would seem better to adhere to the well established rule that pleadings must state facts and not legal conclusions.

PLEADING — THEFT — MONEY. — *Held*, that under an information for theft, describing the property stolen as "lawful money of the United States," proof of a theft of silver certificates or national bank notes was a variance. *Perry* v. *State*, 61 S. W. Rep. 400 (Tex., Cr. App.).

The term "money," when employed in ordinary business transactions, is understood to mean any currency, including bank notes and any other circulating medium in general use as the representative of value. It has been held in a civil action, however, that treasury notes were not to be considered as money. *Foquet* v. *Hoadley*, 3 Conn. 534. But in general, unless specifically objected to when offered, silver certificates and bank notes are legal tender as money. *Bank of U. S.* v. *Bank of Georgia*, 10 Wheat. 333, 347. In criminal courts, however, where accurate specification is required, the term has been narrowly construed, sometimes as including merely coin, and frequently as including only legal tender in its strict meaning. *Pryor* v. *Commonwealth*, 2 Dana (Ky.) 298; *Hamilton* v. *State*, 60 Ind. 193; *Lewis* v. *State*, 28 Tex. App. 140. The broader interpretation in use in civil cases has been extended to indictments in some jurisdictions. *Commonwealth* v. *Lincoln*, 93 Mass. 233. No actual benefit comes to any one by requiring a particular description, since the only result is a long and useless enumeration of all kinds of money. The highly technical rule of the principal case, though firmly established in many jurisdictions, is therefore undesirable.

PROPERTY — COVENANT AGAINST INCUMBRANCES — REMOTE GRANTEE. — *Held*, that a covenant against incumbrances is broken, if at all, as soon as made, thus becoming a chose in action which does not run with the land; but that this chose in action is impliedly assigned to every subsequent grantee until substantial damages have been suffered. *Geiszler* v. *De Graaf*, 59 N. E. Rep. 993 (N. Y.). See NOTES, p. 150.

PROPERTY — PAROL GIFT OF LAND — DEDICATION. — F promised his neighbors to give land for a schoolhouse site, and they erected a schoolhouse thereon, which subsequently came under the charge of the defendant school district. *Held*, that there was a contract by F with his neighbors to convey the land on the erection of a schoolhouse, that the acts done in pursuance of the contract took it out of the Statute of Frauds, and that therefore the school district had a right to the possession of the land. *Greenwood* v. *School Dist. No.* 4, 85 N. W. Rep. 241 (Mich.).

There are many cases wherein specific performance of a promise to give land has been decreed in favor of a promisee in possession who has made valuable improvements, although it is difficult to find any evidence of consideration. *Ungley* v. *Ungley*, L. R. 4 Ch. D. 73; *Freeman* v. *Freeman*, 43 N. Y. 34. These cases apparently make no distinction between a contract and a gift on condition. *Neale* v. *Neale*, 9 Wall. 1. In reality they can hardly be distinguished from other cases in which a licensee under similar circumstances is not protected. *Minneapolis Mill Co.* v. *Minneapolis & St. L. Ry. Co.*, 51 Minn. 304. In the principal case the fact that no specific grantees were named makes it impossible to support the decision on the ground of contract. It is suggested that the gift might have been held effective as a dedication of the land for public purposes, the intention to dedicate and acceptance by user being manifest. *City of Cincinnati* v. *White*, 6 Pet. 431. This doctrine originally applied only to highways, but in this country extensions of it, though perhaps objectionable because the beneficiary is a limited part of the public, are often allowed. A common example is the dedication of a burying-ground to a particular body of people. *Beatty* v. *Kurtz*, 2 Pet. 566. And the dedication of land for public schools has been supported. *Carpenteria School Dist.* v. *Heath*, 56 Cal. 478.

PROPERTY — STATUTE OF LIMITATIONS — PUBLIC USE. — The defendant occupied adversely and exclusively for the statutory time part of a railroad's right of way. *Held*, that the use by the railroad is for a public purpose, and therefore the right of way is not lost. *Southern Pac. Ry. Co.* v. *Hyatt*, 64 Pac. Rep. 272 (Cal., Sup. Ct.). See NOTES, p. 146.

PROPERTY — WILLS — REVIVAL. — A testator duly executed a second will, which impliedly revoked his first will. Later, with the intention of reviving his first will, he destroyed the second. *Held*, that the first will must be admitted to probate, it conclusively appearing that the testator intended to reinstate that will, and the question of revival depending upon the intent manifested in the destruction of the revoking will. *In re Gould's Will*, 47 Atl. Rep. 1082 (Vt.). See NOTES, p. 142.

QUASI-CONTRACTS — BREACH OF EXPRESS CONTRACT — MEASURE OF DAMAGES. — The plaintiff, having committed a material breach of an express contract, sued on the common counts to recover the value of labor and materials furnished under that contract. *Held*, that the value to the defendant of the building produced is the measure of damages. *Gillis* v. *Cobe*, 59 N. E. Rep. 455 (Mass.). See NOTES, p. 144.

SALES — WARRANTY — RESCISSION. — The plaintiff furnished the defendant with a machine of a particular kind in fulfilment of an order. The machine proved defective. *Held*, that the defendant has no right to rescind the contract and return the machine, and that the plaintiff is entitled to recover the purchase price. *Worcester Mfg. Co.* v. *Waterbury Brass Co.*, 48 Atl. Rep. 422 (Conn.). See NOTES, p. 148.

TELEGRAPHS — FAILURE TO DELIVER MESSAGE — LIABILITY TO ADDRESSEE. — *Held*, that the addressee of a telegram containing notice of the fatal illness of his son may recover from the telegraph company for a negligent failure to deliver. *Western Union Tel. Co.* v. *Norris*, 60 S. W. Rep. 982 (Tex., Civ. App.). See NOTES, p. 143.

TELEGRAPHS — REASONABLE REGULATIONS — POWER TO STIPULATE AGAINST LIABILITY FOR NEGLIGENCE. — *Held*, that the stipulation upon a telegraph blank that the telegraph company shall not be liable for mistakes unless the message is repeated, is invalid and does not prevent a recovery for a negligent mistake in the transmission of an unrepeated message. *Western Union Tel. Co.* v. *Norris*, 60 S. W. Rep. 982. (Tex., Civ. App.).

This doctrine is law in many states, being rested upon the ground of public policy. *Gillis* v. *Western Union Tel. Co.*, 61 Vt. 461. Upon principle, however, the decision is difficult to support, and the contrary has been held in England, in many American jurisdictions, and in the Supreme Court of the United States. *Primrose* v. *Western Union Tel. Co.*, 154 U. S. 1. Telegraph companies as public servants are under an obligation to undertake the transmission of all messages offered them, for a reasonable remuneration and under a full liability for negligence. *Baldwin* v. *United States Tel. Co.*, 45 N. Y. 744, 751. This obligation they offer to perform for the cost of a repeated message, and no case has been found holding such a charge unreasonable. Absolute accuracy in the transmission of messages by electricity is assured only by their repetition, a process frequently involving waste of time and labor. To avoid this, telegraph companies offer a special rate, that is, the cost of an unrepeated message, to the sender who agrees to take the chance of mistakes in the transmission of the message without repetition. If the sender chooses to accept this offer it is difficult to see how the public interest is injured by the enforcement of the resulting contract. Of course, a wilful or fraudulent mistake in transmission will not be protected by any agreement. *Ellis* v. *American Tel. Co.*, 95 Mass. 226, 234.

TORTS — DECEIT — REPRESENTATION BROUGHT ABOUT BY THE DEFENDANT. — A commercial agency gave the defendant an erroneous rating, based in part on false information given it by the defendant as to his financial condition. Relying on this rating, the plaintiff furnished goods to the defendant on credit. The defendant became bankrupt. *Held*, that the plaintiff cannot recover in an action for deceit. *Tindle* v. *Birkett*, 57 N. Y. App. Div. 450.

One who makes false statements to a mercantile agency, which repeats them on his authority to a third person, is liable to the latter, if in reliance thereon he extends credit to the maker and is damaged thereby. *Eaton, etc., Co.* v. *Avery*, 83 N. Y. 31. In the principal case, the plaintiff, not knowing of the defendant's statements, could not rely on them. But he did act to his injury in reliance on the rating of the agency, which was a representation intentionally caused by the defendant. In such circumstances an action might well be allowed, although to do so would be slightly to extend the strict rule that the plaintiff must rely on a representation made by the defendant. No decisions have been found directly supporting the principal case, but see *Peek* v.

Gurney, L. R. 6 H. L. 377, 397. In the following cases, opposed to the principal decision, the statements of the defendants were the whole cause of the rating. *Aultman, etc., Co.* v. *Carr*, 16 Tex. Civ. App. 430; *Bedford* v. *Bagshaw*, 4 H. & N. 538; *Regina* v. *Aspinwall*, L. R. 2 Q. B. D. 48. Although in the English cases cited the plaintiffs knew that the defendants had made statements, the cases cannot be distinguished on this ground, since it was the ratings on which the plaintiffs relied.

TORTS — NEGLIGENCE — JOINT TORT-FEASORS. — *Held*, that one injured by a defective sidewalk cannot sue the municipality and the property owner in the same action, though both may be liable. *Dutton* v. *Borough of Lansdowne*, 48 Atl. Rep. 494 (Pa.).

Though the decisions as to who are joint tort-feasors are probably irreconcilable on principle, yet in actions for negligence the better view seems to be that where two persons have caused a single damage to a third, they are jointly liable to him, though there was no concert between them. *Colegrove* v. *N. Y., etc., Ry. Co.*, 20 N. Y. 492; *Cuddy* v. *Horn*, 46 Mich. 596. Even where this is not law it has been held that in a state of facts very similar to those in the principal case there is a joint liability because there is a breach of a common duty to repair. *Chicago, etc., Ry. Co.* v. *Scates*, 90 Ill. 586; *City of Peoria* v. *Simpson*, 110 Ill. 295. Moreover, this joint liability to the injured person exists though the municipality may recover over against the owner. *McDonald* v. *Lockport*, 28 Ill. App. 157. In the principal case it is said that the duty of the municipality is not to repair the sidewalk, but to make the owner repair it. This would imply that if the owner cannot be made to repair, the municipality need not do so. But even if this were the correct view of the obligations of the parties, it seems insufficient to distinguish the case from those cited. The decision is, therefore, not to be supported.

TORTS — SLANDER — PRIVILEGED COMMUNICATION. — The defendant, a voter and taxpayer, in a conversation with other voters and taxpayers, said that the plaintiff, then a candidate for alderman, was a thief. *Held*, that it was error to charge that truth was the only defence, disregarding the defence of privilege. *Ross* v. *Ward*, 85 N. W. Rep. 182 (S. D.).

This case is decided under the state Code, which however, as to what constitutes privilege, seems declaratory of the common law as expressed in *Harrison* v. *Bush*, 5 E. & B. 344. It is perhaps most commonly held that the conduct and qualifications of a public officer or candidate are proper subjects of fair comment, but that a communication of fact in regard to such a person is not privileged. *Hamilton* v. *Eno*, 81 N. Y. 116. In one state it has been held that a candidate is on the same footing as a private individual. *Banner, etc., Co.* v. *State*, 16 Lea (Tenn.) 176. A third view is that when statements of fact relate to the candidate's fitness for office and are published by one voter to other voters, the occasion is privileged. *Marks* v. *Baker*, 28 Minn. 162; see 23 AM. LAW REV. 346. This is of course a conditional, not an absolute privilege, and the defence may be rebutted in the same way as in any other case of conditional privilege. The principal case, in following this liberal view, seems to subserve the public interests without doing violence to the general principles relating to the question of privilege.

TORTS — TRESPASSING DOG — POISON. — *Held*, that the defendant is not liable if a neighbor's dog is killed by poison placed by the defendant on his premises to protect them against the depredations of dogs. *Cobb* v. *Cater*, 38 S. E. Rep. 114 (S. C.).

Although at common law dogs are not the subject of property for all purposes, yet it has been held from an early date that there is sufficient property in a dog to enable the owner to maintain a civil action for injury to the animal. BRO. ABR., tit. TRESPASS, 407; *Brent* v. *Kimball*, 60 Ill. 211. Accordingly, killing a dog is justifiable only when it is reasonably necessary for the protection of property from serious damage. *Bowers* v. *Horen*, 93 Mich. 420; *Dunning* v. *Bird*, 24 Ill. App. 270. There seems to have been no such necessity here. It might be argued, however, that the defendant is not liable for damage caused to a trespassing dog by the condition of the defendant's land. But while one is under no duty to keep his premises safe for trespassers, whether persons or animals, he must not do anything equivalent to laying a trap for them. BISH., NON-CONT. LAW, § 943. It would seem that this rule should have been applied in the principal case, and the weight of authority supports that view. *Gillum* v. *Sisson*, 53 Mo. App. 516.

TRUSTS — CONTRACT OF SALE — RIGHT OF VENDEE TO PROCEEDS OF INSURANCE POLICIES. — The plaintiff and the defendant entered into a contract for the purchase and sale of the defendant's land. Before the purchase price was paid, and while the vendor was still in possesion, the premises were injured by fire. The property had been insured by the vendor prior to the contract. *Held*, that the proceeds of the insurance policies, received by the vendor after the contract was fully performed, belong to the vendee. *William Skinner, etc., Co.* v. *Houghton*, 48 Atl. Rep. 85 (Md.).

The court reaches its conclusion on the theory that by the contract the vendee acquires the rights of substantial ownership, and that the relation of the parties is then that of trustee and *cestui que trust*. Admitting that this is practically true for many purposes, the question as to who should bear the risk of loss while the vendor retains possession has given rise to a difference of opinion. The court's view seems the sound one, and is in accord with the weight of authority. *Paine* v. *Meller*, 6 Ves. 349; *Lombard* v. *Chicago Sinai Cong.*, 64 Ill. 477, 482. See 1 COLUMBIA LAW REV. 1. There is, however, strong authority *contra*. *Gould* v. *Murch*, 70 Me. 288. See 9 HARV. LAW REV. 106, 111. Under any view the relation of the parties would seem to be more nearly that of mortgage than of trust in the strict sense. *Lysaght* v. *Edwards*, L. R. 2 Ch. Div. 499, 506. And granting that the risk of loss is on the vendee, the conclusion of the court by no means follows. A contract of insurance is a personal contract of indemnity against loss to the insured's interest in the property. MAY, INS., § 6. Hence it is difficult to see on what principle the vendee is entitled, without an assignment, to this right obtained by the vendor wholly for himself. The English law is settled contrary to the principal case. *Rayner* v. *Preston*, L. R. 18 Ch. D. 1. There seems to be no American decision exactly in point except *King* v. *Preston*, 11 La. Ann. 95, which follows the English law. But the principal case is supported by numerous *dicta*. *Cf. Hill* v. *Cumberland Valley Co.*, 59 Pa. St. 474, 478.

TRUSTS — FRAUD OF TRUSTEE — LIABILITY OF TRANSFEREE. — An executor under a will containing a legacy to the defendant, a missionary society, paid the legacy out of funds not part of the estate, but held in trust for the plaintiff. The defendant afterwards, in good faith, expended the money. The plaintiff brings a bill in equity. *Held*, that he cannot recover. *Holly* v. *Domestic, etc., Soc.*, 21 Sup. Ct. Rep. 395.

According to the weight of authority, the transfer of negotiable paper in payment of an antecedent debt is a transfer for value. *Swift* v. *Tyson*, 16 Pet. 1. *A fortiori* this is true of money. Even in New York, where the contrary view is held as to negotiable paper, it does not apply to money. *Stephens* v. *Board of Education, etc.*, 79 N. Y. 183. The society might therefore be treated as a purchaser for value, the money being received in payment of the executor's liability. Even if a volunteer, however, the society should be protected. Where a volunteer has parted with the property in good faith he is not liable to the defrauded person, except to the extent of the consideration received by him. *Bonesteel* v. *Bonesteel*, 30 Wis. 516; *Robes* v. *Bent*, Moo. K. B. 552. Where he has received no consideration, having parted with the property, he could be liable only on the ground of breach of a constructive trust. But it is not against conscience for him to transfer while still in ignorance of the defrauded person's claim, and so there is no breach of trust. From either point of view, therefore, the case seems correct.

TRUSTS — NOTICE — LIABILITY FOR AIDING TRUSTEE'S BREACH. — Shares in the defendant corporation standing in the name of X, as trustee, were assigned by him in breach of trust, the instrument of assignment describing him as trustee. The defendant, having no notice that the assignment was improper, but without making inquiry, transferred the shares on its books to the assignee. *Held*, that the term "trustee" on the books of the company and in the assignment gave notice of the trust, that there is a presumption that a trustee has no power to sell or transfer the trust property, and that the defendant must therefore compensate the *cestui* for the loss incurred. *Geyser-Marion, etc., Co.* v. *Stark*, 106 Fed. Rep. 558 (C. C. A., Eighth Circ.).

In applying the principle that a purchaser for value takes the trust property subject to equities of which he has notice, it is held that actual notice that the property is incumbered constitutes constructive notice of those equities which due diligence would have disclosed. *Shaw* v. *Spencer*, 100 Mass. 382, 390; *Jones* v. *Smith*, 1 Hare, 43, 55. Provided that he has notice, one who aids a trustee in committing a breach of trust is equally liable to the *cestui*. *Duckett* v. *National Mech. Bank*, 86 Md. 400. As in the case of a purchaser, actual notice that a breach is being committed is not indispensa-

ble, and it has frequently been held that the term "trustee" carries constructive notice. *Marbury* v. *Ehlen*, 72 Md. 206. The basis of liability is therefore the same in both classes of cases, namely, a negligent confederation with the trustee in an act injurious to the *cestui*. While in some cases of trust of personal property there is an implied power of sale, *Jones* v. *Atchison, etc., R. R. Co.*, 150 Mass. 304, trustees do not usually have such power, and these exceptional cases afford no excuse for a total failure to investigate, as in the principal case.

REVIEWS.

LEGISLATIVE METHODS AND FORMS. By Sir Courtenay Ilbert, K. C. S. I. E. Oxford: The Clarendon Press; London and New York: Henry Frowde. 1901. pp. xxxi, 372.

The author's position, as Parliamentary Counsel to the Treasury, is a sufficient guaranty of the worth of any work from his hands on the subject of legislative methods, since upon him rests the responsibility for the drafting and form at every stage of all the Government bills introduced into the British Parliament. From a man who has so ably filled this important office much was to be expected, and those who will have the good fortune to read Sir Courtenay Ilbert's book will be in no wise disappointed. Beginning with a brief sketch of the customary law of England and its relation to the statute law the author contrasts the English legal system with that of various countries of continental Europe. After a short discussion of the contents of the English statute book and the different editions of the Statutes, he describes at considerable length the various efforts to systematize and improve the statutory law, both by the expurgation of defunct acts and by the consolidation of living measures. The chapter on codification is intensely interesting. The author ascribes the failure of the ambitious projects of the various codifiers partially to the absence in England of the motive force so keenly felt in continental Europe, namely, the absolute necessity consequent on increasing commerce of doing away with the diverse systems of law that so frequently prevailed in different portions of what had become one country. For example, in Germany, before the present code there were six general systems of law in force, besides numerous local customs. In England, however, the King's Writ ran over the entire country centuries before there was any central judicial authority in the continental nations. But the author finds the chief reason for the dilatoriness of England as regards codification in the haphazard system of English legal education, the student rarely seeking to take a scientific view of the legal principles he is applying. The author does not consider the cause of codification hopeless in England, notwithstanding the relaxation of such efforts since 1896, but he recognizes the great difficulties in its way — not the least of which is the general unpopularity of these acts, and the almost entire passivity of the legal profession, with the exception of the commercial lawyers, to whose efforts are due what legislation there is along that line — the Partnership Act, The Bills of Exchange Act, and the Sale of Goods Act, to say nothing of that monumental piece of consolidation, the Merchants' Shipping Bill.

A great deal of very valuable material is to be found in the chapter